Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

No. 77-1644

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1977

UNITED STATES OF AMERICA, PETITIONER

v.

ZAC A. CRITTENDEN, JR.
d/b/a CRITTENDEN TRACTOR COMPANY

RESPONSE OF ZAC A. CRITTENDEN, JR. d/b/a CRITTENDEN TRACTOR COMPANY TO PETITION FOR WRIT OF CERTIORARI

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ZAC A. CRITTENDEN, JR.,
d/b/a CRITTENDEN TRACTOR
COMPANY

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I.

ARGUMENT AND CITATION OF AUTHORITY

A.

THE GRANTING OF THE WRIT OF CERTIORARI IN A DIFFERENT CASE IS NO REASON FOR GRANTING IT IN THE PRESENT ACTION.

The United States of America argues that the granting of Certiorari in Kimbell Foods, Inc. v. Republican National Bank, 557

F.2d 491 (C.A. 5) provides a reason for granting Certiorari in this case. Crittenden was not a party to Kimbell, supra, and certainly not apprised of the reason that the Supreme Court of the United States granted Certiorari. However, the Kimbell case involves different issues from those presented in this case.

In Kimbell, the Court applied Texas law. In the instant case, the Court applied federal common law, albeit modeled after the Uniform Commercial Code. In Kimbell, the Court rejected the "choateness" aspect of the "first in time, first in right priority rule, but nevertheless, awarded priority to the lienor, who was "first in time;" in this case, the Court disreguarded both aspects of the so-called "choate lien" test. In Kimbell, the contest was between two commercial lenders (the SBA being the asignee of one such lender); in this case the contest is between the FHA and a mechanic, an individual whose special status is recognized in the Tax Lien Act.

Therefore, the granting of Certiorari in Kimbell should not be considered as a reason for granting Certiorari in this case. Although both cases involve the "first in time, first in right" rule, there is no other factual similarity between the cases and no identity of issues presented.

The only rationale presented by the Petition for Writ of Certiorari is that the Court granted the Writ in Kimbell; Crittenden submits that such reasoning is insufficient and does not comport with Rule 19 of this Court.

B.

THE DECISION OF THE COURT OF APPEALS IS CORRECT.

The Court of Appeals, applying federal common law, determined that a possessory mechanic's lien is superior to an FHA security interest, perfected pursuant to the Uniform Commercial Code to the extent that the mechanic continuously possesses collateral. In so deciding, the Court of Appeals simply placed the FHA in the same position that a non-governmental lender would be placed in a forum which has adopted the uniform version of the Uniform Commercial Code (UCC §9-310). As Judge Goldberg observed in this case:

> Super priority for mechanics has been embraced by Congress in the Tax Lien Act, 26 U.S.C. §6323(b)(5), and by the overwhelming majority of states in their adoption of the model version of U.C.C. §9-310. The limited priority of the mechanic's lien is not new to our jurisprudence, and even in the complexity of our modern commercial society, it is a doctrine of respectful antiquity and one not to be disguarded facilely and without real justification by the evolving common law. 563 F.2d at 689.

C.

CONCLUSION

The decision of the Court of Appeals affirming Judgment in favor of Crittenden in the amount of $543.81 is imminently correct. For the foregoing reasons, the Writ of Certiorari should not be granted.

Respectfully submitted,

FREEMAN & HAWKINS

Joe C. Freeman Jr

JOE C. FREEMAN, JR.

Howell Hollis III

HOWELL HOLLIS III

CERTIFICATE OF SERVICE

This is to certify that I have this date served Wade H. McCree, Jr., Solicitor General, with a copy of the within and foregoing Response of Zac A. Crittenden, Jr., d/b/a Crittenden Tractor Company to Petition for Writ of Certiorari by depositing same in the United States Mails in a properly addressed envelope addressed to Wade H. McCree, Jr., Solicitor General, Department of Justice, Washington, D. C. 25030, with sufficient postate affixed thereon.

This 2nd day of August, 1978.

FREEMAN & HAWKINS

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COMPANY